PUBLIC PROSECUTOR v. LAU MEE TUNG

[O.Cr.J. (Seah J.) April 22, 1977]

[Kuching — Criminal Trial No. K.3 of 1977]

Criminal Law and Procedure — Trial — Transfer to High Court — Criminal Procedure Code (F.M.S. Cap. 6), ss. 138 and 177.

Shipping — Merchant Shipping Ordinance, 1960, ss. 169(2) and 178.

In this case the accused was convicted in the Magistrate's Court on October 18, 1976 on his own plea of guilty of an offence punishable under section 169(2)of the Merchant Shipping Ordinance 1960 read with section 178 of the said Ordinance. He was fined $500 or in default one month's imprisonment. The Public Prosecutor appealed to the High Court against the inadequacy of the sentence. On April 4, 1977 the High Court heard the appeal and ordered that the conviction of the lower court be quashed and that the case be retried before another Magistrate. On April 12, 1977 the accused was brought before Mr. William Lee, a Magistrate of the First Class, and pleaded not guilty to the charge. When the accused appeared before the Magistrate again on April 21, 1977 the prosecution applied for the case to be transfered to the High Court under section 177 of the Criminal Procedure Code having regard to the provisions of section 169(2) and (3) of the Merchant Shipping Ordinance 1960 and section 8E(i)(a) of the Code. The application was opposed by counsel for the accused on two main grounds. Firstly, it was submitted that in view of the provision of section 138 of the Code the trial Magistrate had no jurisdiction to transfer the case for trial in the High Court without first holding a preliminary inquiry. Secondly, it was contended that such a transfer would be contrary to the order of the appellate court directing the case to be retried before another Magistrate.

Held: (1) in regard to the question as to how the trial Magistrate should exercise his discretion under section 177 of the Criminal Procedure Code, it depends whether the case was triable by the District Court or only by the High Court. If the case was triable by the District Court, then the trial Magistrate should make an order transferring it for trial in the higher court or the High Court, as the case may be, without holding a preliminary inquiry. On the other hand, if the case was triable in the High Court, then the trial Magistrate should not make a transfer without first holding a preliminary inquiry pursuant to section 138 of the Code;

(2) the trial Magistrate had no jurisdiction to transfer the case for trial in the High Court without first holding a preliminary inquiry.

Case referred to:-

(1) *Public Prosecutor* v. *Viran* [1947] M.L.J. 62.

CRIMINAL TRIAL.

Michael Tan (Deputy Public Prosecutor) for the public prosecutor.

J.T.H. Lee for the accused.

Seah J.: This case comes before the High Court in rather peculiar circumstances.

On October 18, 1976 the accused was convicted on his own plea of an offence punishable under section 169(2) of the Merchant Shipping Ordinance 1960 read with section 178 of the said Ordinance. He was fined $500 or in default one month's imprisonment. The Public Prosecutor appealed to the High Court against the inadequacy of sentence. On April 4, 1977 the High Court heard the appeal and ordered that the conviction of the lower court be quashed and that the case be retried before another Magistrate.

On April 12, 1977 the accused was brought before Mr. William Lee, a Magistrate of the First Class, and pleaded not guilty to the charge.

When the accused appeared before the Magistrate again on April 21, 1977 the D.P.P. applied for the case to be transferred to the High Court under section 177 of the F.M.S. Criminal Procedure Code having regard to the provisions of section 169(2) and (3) of the Merchant Shipping Ordinance 1960 and section 8E(i)(a) of the Code.

The application was opposed by counsel for the accused on two main grounds. Firstly, it was submitted that in view of the provision of section 138 of the Code the trial Magistrate had no jurisdiction to transfer the case for trial in the High Court without first holding a preliminary inquiry. Secondly, it was contended that such a transfer would be contrary to the order of the appellate court directing the case to be retried before another Magistrate.

For the Public Prosecutor, the D.P.P. argued that a preliminary inquiry was not necessary as the case is triable by the District Court. It was further submitted that such a transfer under section 177 of the Code would not contravene the order of the appellate court. Nevertheless, the trial Magistrate ordered as follows:

"Acting under the power conferred by section 177 of the CPC I hereby have this case transferred over to the High Court."

At the High Court, D.P.P. Mr. Michael Tan appeared for the Public Prosecutor and Mr. John Lee represented the accused.

Before the commencement of the trial, defence counsel raised a preliminary objection and repeated the same submissions which he had urged before the trial Magistrate. I would deal with this preliminary objection now.

Sections 138 and 177 of the F.M.S. Criminal Procedure Code read:

"138. The following procedure should be adopted in inquiries before a Magistrate where the inquiry is held with a view to committal for trial before the High Court, and, except as otherwise provided in Chapter XLII, no person shall be tried before such court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter.

177. In any trial before a Magistrate in which it appears at any stage of the proceedings that from cause the case is one which in the opinion of such Magistrate ought to be tried by some Court of higher jurisdiction than his own, or if before or during such trial application is made by the Public Prosecutor, the Magistrate shall stay proceedings and transfer the case to such higher court or proceed under Chapter XVII with a view to the committal of the accused for trial by the High Court, and shall record such order upon the proceedings."

It is pertinent to note that section 138 is in Chapter XVII which deals with Preliminary Inquiries into cases triable by the High Court whereas section 177 is in Chapter XIX dealing with Summary Trials by Magistrates.

Under section 177 of the Code, the trial Magistrate *may* and on the application of the Public Prosecutor, the trial Magistrate *shall* either (a) transfer the case to the higher court for trial or (b) proceed under Chapter XVII and hold a preliminary inquiry with a view to the committal of the accused for trial by the High Court.

Now, how is the trial Magistrate going to exercise his discretion under this section? In my opinion, it depends whether the case is triable by the District Court or only by the High Court. If the case is triable by the District Court, then in my opinion, the trial Magistrate shall make an order transferring it for trial in the higher court or the High Court, as the case may be, without holding a preliminary inquiry. On the other hand, if the case is triable in the High Court, then the trial Magistrate should not make a transfer without first holding a preliminary inquiry pursuant to section 138 of the Code.

Counsel for the accused has cited the case of *Public Prosecutor* v. *Viran*[1] where Spenser-Wilkinson J. expressed the view that "the only way in which a District Judge can transfer the case to a court of higher jurisdiction than his own is by way of Preliminary Inquiry. Under section 177 therefore, he can either transfer by sending the case to a Magistrate or himself proceed under Chapter XVII of the Criminal Procedure Code." It is plain that the learned judge made no distinction between a case triable in the District Court or Magistrate Court of Session Court and one triable only in the High Court. If the learned judge were of the view that a case triable in the District Court could not be transferred for trial in the High Court under section 177 of the Code without a preliminary inquiry being held under section 138 of the Code, then I respectfully disagree. It follows that Viran's case does not support ground No. 1.

In this case, that the charge against the accused is plainly triable by the District Court is clear from section 249 of the Merchant Shipping Ordinance 1960 which reads:

"249(1) Where a person is charged in Sarawak with any offence under the Merchant Shipping Acts, such offence shall be triable in the following manner —

(a) if, under those Acts, the offence is triable summarily, it shall be triable by a District Court;

(b) if the offence is declared by those Acts to be a misdemeanor, it shall be triable by a District Court.

...."

Section 3(1) of the Subordinate Courts Ordinance (Cap. 42) provides *inter alia*, that Courts of Magistrates of the First Class shall be known also as District Courts.

Since section 138 of the F.M.S. Criminal Procedure Code does not apply to this case, I hold that ground No. 1 of the submission of defence counsel fails.

As regards the second ground, I am of the opinion that by transferring the case to be tried in the High Court under section 177 of the Code, the trial Magistrate and/or the D.P.P. did not act contrary to the order of the appellate court dated April 4, 1977 since such a transfer would be expedient in the ends of justice having regard to the heavy punishment provided for in section 169(3) read with section 169(2) of the Merchant Shipping Ordinance 1960 and section 8E(i)(a) of the F.M.S. Criminal Procedure Code. Under section 8E(i)(a) the District Court of the Magistrate of the First Class may pass a sentence of imprisonment for a term not exceeding 12 months and a fine not exceeding $2000 or a sentence of caning not exceeding 12 strokes. It follows that this ground also fails.

For the above reasons, the preliminary objection of defence counsel is hereby overruled.

Order accordingly.